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**In the Supreme Court of the United States**

OCTOBER TERM, 1990

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**SHIRLEY M. MOLZOF, PERSONAL REPRESENTATIVE  
OF THE ESTATE OF ROBERT E. MOLZOF, PETITIONER**

**v.**

**UNITED STATES OF AMERICA**

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**ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT**

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**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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### **QUESTIONS PRESENTED**

1. Whether a permanently and totally comatose plaintiff may recover damages under the Federal Tort Claims Act for loss of the ability to enjoy life.

2. Whether a plaintiff receiving free medical care from the Veterans Administration is entitled to recover damages for future medical expenses in a Federal Tort Claims Act suit, beyond the amount awarded to supplement his care at a Veterans Administration hospital, even though the record indicated that he would not seek medical care from private sources in the future.

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**OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. 1-9) is reported at 911 F.2d 18. The memorandum and order of the district court (Pet. App. 26-29) are unreported.

**JURISDICTION**

The judgment of the court of appeals was entered on August 30, 1990. The petition for a writ of certiorari was filed on November 27, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

**STATEMENT**

1. Petitioner Shirley Molzof is the personal representative of the estate of Robert E. Molzof, her husband.

(1)

Robert Molzof was a veteran suffering from a service-connected disability and, accordingly, was entitled to receive free medical care from the Veterans Administration pursuant to 38 U.S.C. 610. Pet. App. 3 n.2. On October 31, 1986, he underwent lung surgery at the William S. Middleton Memorial Veterans Hospital in Madison, Wisconsin. Following the surgery, Robert Molzof was temporarily placed on a ventilator. The ventilator's alarm system became disconnected and, while the alarm system was not functioning, the ventilator tube itself became disconnected, causing an interruption in his supply of oxygen. As a result, Robert Molzof sustained irreversible neurological damage, leaving him permanently and totally comatose. *Id.* at 2. He continued to receive care at the VA Hospital in Tomah, Wisconsin. *Id.* at 26.

2. Robert Molzof's guardian ad litem filed suit on his behalf under the Federal Tort Claims Act (FTCA) in the United States District Court for the Western District of Wisconsin. The United States admitted liability and, after a trial on the issue of damages, the district court awarded Robert Molzof \$67,950 for future medical services to supplement the care provided by the VA hospital in three respects: (1) physical therapy sessions; (2) respiratory therapy; and (3) weekly visits by a physician. Pet. App. 4, 27, 32.<sup>1</sup> The district court declined to award requested damages for other future medical expenses. It determined that the free care being provided to Robert Molzof by the VA was reasonable and adequate, that Shirley Molzof was largely satisfied with that care and had no present intention to transfer Robert Molzof to a private facility, and that,

<sup>1</sup>The district court's memorandum and order awarded Robert Molzof \$67,950 for future medical expenses (Pet. App. 27, 29, 32); at a hearing, however, the district court had stated that it would award \$75,750 (*id.* at 23), and the court of appeals referred to that amount (*id.* at 4).

according to the record, neighboring private hospitals could not provide a comparable level of care. *Id.* at 3, 12-13, 27. The court noted that awarding a higher amount would result in double recovery and would be punitive. *Id.* at 27.<sup>2</sup> The court then declined to award Robert Molzof damages for loss of enjoyment of life, reasoning that his condition precluded him even from being aware of such an award or from benefiting from it and that such damages would therefore also be punitive in nature. *Id.* at 4, 28.<sup>3</sup>

After entry of the district court's final judgment, Robert Molzof died; Shirley Molzof, as personal representative of the estate, was substituted as plaintiff. Pet. App. 2 n.1.

3. The court of appeals affirmed. Pet. App. 1-9. Noting the district court's findings regarding the lack of availability of comparable medical care at private medical facilities and the evidence that Robert Molzof would not be transferred to a private facility, the court of appeals agreed with the district court that an award of additional damages for future medical expenses would result in double payment by the government for medical expenses. Pet. App. 5-6. Adopting the approach of the Fourth Circuit in *Flannery v. United States*, 718 F.2d 108, 111 (1983), cert. denied, 467 U.S. 1226 (1984), and of "the majority of circuits," the court of appeals reasoned that an award is "punitive" under the FTCA to the extent that it provides "more than the actual loss suffered by the claimant." Pet. App. 6. Accordingly, the court concluded that an additional award to Robert Molzof for

<sup>2</sup> The recovery of "punitive damages" is not permitted under the FTCA. 28 U.S.C. 2674.

<sup>3</sup> Shirley Molzof had also filed suit under the FTCA on her own behalf, and she received \$150,000 for past and future loss of consortium. Pet. App. 4, 28.



the expenses of future medical care would violate the FTCA's proscription against punitive damages. The court emphasized that it was not formulating a broad rule limiting future medical expenses for any veteran entitled to free medical care (*ibid.*); rather, it was relying on the district court's factual determinations "that the Veterans facility provides the best level of care, that it is not in the plaintiff's best interest to be moved, that the plaintiff's wife is satisfied with the level of care, that she has no present intention to transfer the plaintiff, and that the plaintiff's short life span minimizes the likelihood of changed circumstances." *Id.* at 7.

With regard to damages for loss of enjoyment of life, the court of appeals pointed out that Wisconsin courts had not decided "whether a comatose plaintiff, with no conscious awareness of his *complete loss* of enjoyment of life, is entitled to recover damages for that loss." Pet. App. 7. The court determined, however, that it was unnecessary to predict whether such damages would be recoverable under state law because those damages would, in any event, be barred as punitive under the FTCA. *Id.* at 8. Acknowledging that the Second Circuit had reached a different result in *Rufino v. United States*, 829 F.2d 354 (1987), the court agreed with the Fourth Circuit in *Flannery v. United States*, *supra*, that damages to a comatose plaintiff for loss of enjoyment of life are necessarily punitive because they cannot realistically be viewed as compensatory to such an individual. Pet. App. 8-9. Concluding that "an award of damages for loss of enjoyment of life can in no way recompense, reimburse or otherwise redress a comatose patient's uncognizable loss," the court denied such an award "under the circumstances and findings in this case." *Id.* at 9.

#### ARGUMENT

As the court of appeals pointed out (Pet. App. 6), various courts of appeals have suggested differing interpretations

of the meaning of the term "punitive damages" in the FTCA.<sup>4</sup> We do not believe, however, that this case is a suitable vehicle for resolution of these differences, or that the actual issues presented are as sweeping as petitioner suggests. In this case, the court of appeals affirmed the district court's decision that two particular items of damages should not be permitted: (1) damages to a comatose patient for loss of enjoyment of life and (2) additional future medical expenses. Those specific issues do not warrant review. The issue of loss of enjoyment of life for a comatose person arises infrequently, and, at present, there is no jurisdiction in which such an award would clearly be available under the FTCA. With respect to the lower courts' second determination—that no further award for future medical expenses is appropriate in this case—that determination is reasonable and case-specific. Accordingly, review is not warranted.

1. The court of appeals concluded that Robert Molzof's permanently comatose condition foreclosed any possibility that an award for loss of enjoyment of life could compensate him for his actual loss and that such an award therefore was punitive within the meaning of 28 U.S.C. 2674. The issue presented can be appropriately viewed as the narrow question whether a permanently and totally comatose plaintiff may recover damages under the Act for loss of enjoyment of life.

<sup>4</sup> Compare, e.g., *Flannery v. United States*, 718 F.2d at 111 ("To the extent that an award gives more than the actual loss suffered by the claimant, it is 'punitive' whether or not it carries with it the deterrent and punishing attributes typically associated with the word 'punitive.'"), with *Rufino v. United States*, 829 F.2d at 362 ("We disagree with, and therefore decline to follow, *Flannery*. We agree with the Sixth Circuit that the FTCA's prohibition of punitive damages was designed to prohibit 'use of a retributive theory of punishment against the government.'").

Only two other courts of appeals have considered this specific issue.<sup>5</sup> In *Flannery v. United States*, *supra*, on which the court of appeals here relied, the Fourth Circuit initially certified to the West Virginia Supreme Court the question whether damages for loss of capacity to enjoy life were recoverable under state law notwithstanding the fact that the permanently comatose plaintiff in that case had no awareness of his loss.<sup>6</sup> Following an affirmative response by the state court, the Fourth Circuit determined that such damages were barred by the FTCA's prohibition against punitive damages (28 U.S.C. 2674) because they would be of no direct benefit to the plaintiff. 718 F.2d at 111.

The Second Circuit reached a different conclusion in *Rufino v. United States*, *supra*. There the court of appeals recognized that New York appellate courts had not yet deter-

<sup>5</sup> None of the other cases cited by petitioner concerns such damages. See *Hartz v. United States*, 415 F.2d 259 (5th Cir. 1969) (wrongful death); *D'Ambra v. United States*, 481 F.2d 14 (1st Cir.) (same), cert. denied, 414 U.S. 1075 (1973); *Felder v. United States*, 543 F.2d 657 (9th Cir. 1976) (same); *Kalavity v. United States*, 584 F.2d 809 (6th Cir. 1978) (same); *Shaw v. United States*, 741 F.2d 1202 (9th Cir. 1984) (severe mental and physical retardation caused by birth trauma); *Reilly v. United States*, 863 F.2d 149 (1st Cir. 1988) (same); *Yako v. United States*, 891 F.2d 738 (9th Cir. 1989) (severe brain damage resulting in partial blindness and deafness and permanent mental retardation caused by undiagnosed meningitis); *Manko v. United States*, 830 F.2d 831 (8th Cir. 1987) (partial paralysis caused by swine flu vaccination). The importance of the specific context of particular damages claims is underscored by the fact that petitioner counts two circuits (the First and the Ninth) on *both* sides of the general punitive damages issue. See Pet. 14-15, 16-19. A number of these cases, moreover, focus on the propriety of a deduction from a damages award for income taxes that would have been paid by the victim. See, e.g., *Felder*, 543 F.2d at 665-671.

<sup>6</sup> The FTCA incorporates state law as the substantive standard of federal liability for the negligence of federal employees. 28 U.S.C. 1346(b).

mined whether cognitive awareness was a necessary condition under state law to an award of civil tort damages for loss of enjoyment of life. The Second Circuit predicted, however, that New York courts would ultimately hold that a plaintiff need not be consciously aware to recover such damages. 829 F.2d at 359-362. The Second Circuit went on to determine that 28 U.S.C. 2674 posed no obstacle to such recovery. Rejecting the Fourth Circuit's approach in *Flannery*, the court held that damages are punitive only if based on a retributive theory. Concluding that damages for loss of enjoyment of life have a compensatory purpose, the court ruled that they can be awarded under the FTCA even to a comatose plaintiff. 829 F.2d at 362.

The Second Circuit's prediction in *Rufino* regarding New York law proved to be wrong, however. The New York Court of Appeals subsequently held that state law permitted recovery of civil tort damages for loss of enjoyment of life only where the plaintiff retained "some level of awareness." *McDougald v. Garber*, 538 N.Y.S.2d 937, 940, 536 N.E. 2d 372, 375, 73 N.Y. 2d 246, 253 (1989). The state court concluded that an award of money damages for loss of enjoyment of life to a totally comatose plaintiff "has no meaning or utility to the injured person" and, accordingly, serves no compensatory purpose. *Ibid*.

In light of the New York court's decision in *McDougald*, the theoretical conflict between *Flannery* and *Rufino* may have no practical consequence. Potential plaintiffs in the factual circumstances of Robert Molzof would now be precluded from recovering such damages in an FTCA action arising either in West Virginia (and other states in the Fourth Circuit) or in New York, albeit for different reasons.<sup>7</sup> The same result obviously applies under the Seventh Circuit's decision in this case.

<sup>7</sup> We have found no decision in the other States in the Second Circuit permitting such damages to be awarded.



Moreover, it is by no means clear that Robert Molzof would be entitled to recover damages for loss of enjoyment of life even if this Court were to review the Seventh Circuit's interpretation of 28 U.S.C. 2674 and determine that it was erroneous. The Seventh Circuit decided that Robert Molzof's recovery of damages for loss of enjoyment of life is barred by 28 U.S.C. 2674 and did not resolve whether he was entitled to such damages under Wisconsin law. Indeed, the court of appeals acknowledged that Wisconsin courts have not yet ruled on the question whether a comatose plaintiff is eligible for such damages under Wisconsin law. Pet. App. 7-8.

The question whether the FTCA bars recovery of damages for loss of enjoyment of life by a permanently comatose plaintiff is not an issue requiring this Court's review in the absence of a genuine conflict with practical consequences for real plaintiffs under clearly decided state law. This is not such a case.

2. The court of appeals also concluded that damages for future medical expenses beyond those necessary to supplement the care Molzof was receiving in the VA hospital would result in double recovery and would accordingly be punitive. That conclusion was based on the particular facts of this case, and, contrary to petitioner's assertion (Pet. 22-23), creates no conflict with decisions in other circuits.

The court of appeals determined, on the basis of factual findings by the district court, that the VA hospital where Robert Molzof was receiving care provided the best level of care available; that it was not in his best interest to be moved; that Shirley Molzof was satisfied with the level of care Robert Molzof was receiving and had no present intention to transfer him to a private facility; and that Robert Molzof's short life expectancy minimized the likelihood that these circumstances would change. Pet. App. 7. The court of appeals accordingly agreed with the district court that

an award for additional future medical expenses would result in double recovery with a punitive effect. *Id.* at 6-7.

Petitioner contends that this holding conflicts with *Ulrich v. Veterans Admin. Hosp.*, 853 F.2d 1078 (2d Cir. 1988), and *Feeley v. United States*, 337 F.2d 924 (3d Cir. 1964). In those decisions, the courts held that an FTCA plaintiff eligible for free VA medical care was entitled to an award for future medical expenses to permit him to choose whether he wished to continue to obtain such care from the VA. The court of appeals here took pains to state that it agreed with *Ulrich* and *Feeley* that the availability of free medical care to a veteran does not automatically limit an FTCA award for future medical expenses. Pet. App. 6-7. The court stressed, however, that the record in this case established no likelihood that Robert Molzof would transfer to a private facility, and thus no reason to believe that an award for future medical expenses (beyond that awarded to supplement the care at the VA hospital) would actually be used for such expenses. *Id.* at 7. The court thus agreed with the general principle in *Ulrich* and *Feeley*, and carefully distinguished the facts of this case.

The court of appeals' fact-bound decision that Molzof was not entitled to an award of additional damages for future medical care conflicts with no other appellate decisions and does not warrant this Court's review.\*

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\* Petitioner also claims (Pet. 29) that, if Congress had intended to prohibit double recovery in these circumstances, it would have included an explicit provision to that effect, as in 38 U.S.C. 351. But 38 U.S.C. 351 concerns the payment of VA disability benefits: it provides for a set-off, against future VA disability benefits, of any judgment or settlement of an FTCA claim arising from injuries suffered or aggravated as a result of hospitalization, medical or surgical treatment, or vocational rehabilitation provided by the VA. 38 U.S.C. 351 thus exclusively addresses circumstances in which, by definition, VA benefits and FTCA malpractice damages overlap. In contrast, 38 U.S.C. 610 (under which



**CONCLUSION**

The petition for a writ of certiorari should be denied.  
Respectfully submitted.

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Robert Molzof was eligible for free medical care) concerns the general eligibility of veterans with service-connected disabilities and of specified other veterans for hospitalization and nursing care. 38 U.S.C. 610 thus has a far broader scope than 38 U.S.C. 351, and includes many circumstances in which the issue of double recovery is not pertinent. That Congress did not explicitly provide for a set-off of FTCA damages against the medical benefits provided under 38 U.S.C. 610 thus does not establish that Congress intended to provide double recovery for tort plaintiffs who will receive such medical benefits.